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March 31, 1997

William F. Caton  
Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

**RECEIVED**  
**MAR 31 1997**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: MM Docket No. 95-176/FCC 97-4 - Closed Captioning NPRM

Dear Mr. Caton:

Enclosed please find an original and eleven (11) copies of the Reply Comments of NIMA International ("NIMA") in the above-referenced proceeding. Also enclosed is a 3½ inch diskete containing a read-only version of NIMA's comments.

We are also providing one additional copy of the Comments, which we ask that you kindly date-stamp and return to the messenger. We appreciate your assistance.

Please contact me if you have any questions.

Sincerely,



Heather L. McDowell

Enclosures

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

MAR 31 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Closed Captioning and Video Description )  
of Video Programming )  
 )  
Implementation of Section 305 of the )  
Telecommunications Act of 1996 )  
 )  
Video Programming Accessibility )

MM Docket No. 95-176

**REPLY COMMENTS OF NIMA INTERNATIONAL**

An examination of the comments filed in this proceeding discloses that one issue warrants a brief response by NIMA International ("NIMA"): Some parties seem to contend that, regardless of the type of programming involved, no classes of programming should be exempt from the closed captioning requirements. This is profoundly misguided as both a policy and practical matter. The Commission must not depend on individual petitions for exemption. The final rules may and should exempt general classes of programming, including all direct response advertising.

In our comments in this proceeding, we have shown that exempting both long- and short-form direct response advertising, as well as television shopping programs, from mandatory closed captioning will not impair the laudable goals underlying section 305 of the Telecommunications Act of 1996 ("the 1996 Act")<sup>1/</sup> because such programming is already presented in a form readily accessible by the hearing impaired. Captioning

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<sup>1/</sup> Pub. L. 104-104, 110 Stat. 56 (1996). Section 305 added section 713 to the Communications Act of 1934, codified at 47 U.S.C. § 613.

would, therefore, merely add cost, to the detriment of all consumers.<sup>2/</sup> Many other parties also support this conclusion.<sup>3/</sup> Some commenters, however, have suggested that no general category of programming should be exempted at this stage.<sup>4/</sup> Such an extreme view is neither supported by the 1996 Act, nor workable as a regulatory framework.

The Commission's statutory authority to exempt general categories of programming is unmistakably clear. Congress recognized that captioning certain types of programming would likely provide such marginal benefits that the associated costs would not be justified and, accordingly, conferred on the Commission ample authority to relieve those program owners or providers of those unwarranted burdens. The 1996 Act expressly invites the Commission to exempt "programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome."<sup>5/</sup>

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<sup>2/</sup> Comments of NIMA International (February 28, 1997).

<sup>3/</sup> See, e.g., Comments of the National Association of Broadcasters at 14-15 (February 28, 1997); Comments of the National Cable Television Association at 24-26 (February 28, 1997); Comments of Paxson Communications Corporation at 7-8 (February 28, 1997); Comments of ABC, Inc. at 10-12 (February 28, 1997); Comments of CBS, Inc. at 13 (February 28, 1997); Comments of National Broadcasting Company, Inc. at 11-13 (February 28, 1997); Comments of HSN, Inc. (February 28, 1997) Comments of QVC, Inc. (February 28, 1997); Comments of the American Association of Advertising Agencies (February 28, 1997); Comments of the United States Satellite Broadcasting Company, Inc. at 11 (February 28, 1997).

<sup>4/</sup> See, e.g., National Council on Disability, Comments to Federal Communications Commission at 3 (February 28, 1997).

<sup>5/</sup> 47 U.S.C. § 613(d)(1).

Congress, and indeed, the Commission,<sup>6/</sup> also recognized that it would not be feasible to address this cost-benefit analysis effectively on a piecemeal, case-by-case basis. In the absence of appropriate categorical exemptions, program owners or providers by the thousands will be forced to petition for individual relief. Because there is sufficient basis now, before the rules become final, to exempt classes of programming such as direct response advertising, exclusive reliance on a petition process would serve only to add unnecessary costs for those program categories and drain Commission resources. Rather, the petition process should be used only in cases of uncertainty, where the applicability of an exemption may be in doubt, or for exceptional circumstances.

A case-by-case approach would also lead to severe economic loss and disadvantage for advertisers in the direct response marketing industry. Many products or services marketed through infomercial or short-form direct response ads can develop from concept, through production and broadcast, to the exhaustion of the advertisement's useful life in a period of months. Television shopping is constantly changing, with new items offered through live programming on a 24-hour basis. Without a categorical exemption for these types of programming, direct response marketers would be left to wait while the Commission considered each individual request, along with the myriad petitions filed by other programmers. Absent categorical exemptions, no expedited petition procedure, however streamlined, will realistically enable the Commission to

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<sup>6/</sup> See, e.g., In the Matter of Closed Captioning and Video Description of Video Programming, \_\_\_\_ FCC Rcd. \_\_\_\_, MM Docket No. 95-176, FCC 967-4, ¶¶ 70-71 (Adopted January 9, 1997; Released January 17, 1997) ("NPRM").

wade through the thousands of petitions it will receive at a pace that can match the legitimate planning, production, and marketing schedules of most programmers, and certainly not for direct response advertisers. NIMA is convinced that countless opportunities, for both marketers and the buying public, may be lost.

Without categorical exemptions, the marketer and producing entity would have essentially three, equally problematic choices: (1) halt or delay production indefinitely while they await a Commission ruling; (2) produce a program without captions and risk sanctions and the probable refusal of stations and cable operators to air the direct response program or spot; or (3) incur the expense of captioning only to receive an exemption later. Surely this is not what Congress intended, nor does it further the interests of the American public.

The approach that we have advocated is supported by analogy to the Commission's rules for political broadcasts under section 315(a) of the Communications Act of 1934.<sup>27</sup> In that context, relying on Commission experience and precedent, Congress itself created certain categorical exemptions from the equal opportunities requirement; the Commission's petition process has thus been confined to resolving uncertainty at the margins and exceptional cases. The only difference here is that Congress, not having the benefit of prior Commission experience, has directed the Commission to develop the record and to define the general categories of programming as to which the benefits of closed captioning are outweighed by the costs and burdens of

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<sup>27</sup> 47 U.S.C. § 315(a).

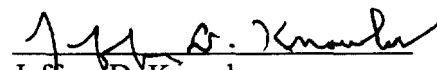
captioning. The Commission now has that record, and it is clear that all forms of direct response television advertising should be exempt. It has never been claimed that the political broadcast solution is overly prescriptive. By parity of reason, creating an exemption for categories of programming, such as direct response advertising, would not open the Commission to such a claim. On the contrary, the failure to create categorical exemptions would be unduly prescriptive, because it would mean that closed captioning is presumptively required in all cases, despite a record before the Commission that shows that this presumption is invalid.

NIMA appreciates the Commission's desire to achieve balance in implementing section 305 of the 1996 Act. Exempting certain categories of programming from the mandatory captioning rules, however, is a balanced approach; it represents a sensible accommodation between the costs and benefits of captioning, and the practical obstacles raised by trying to address those issues on a case-by-case basis. This balancing approach clearly justifies a categorical exemption for all forms of direct response advertising, including television shopping.

Respectfully submitted,

NIMA International

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